

CASE LAW QUARTERLY

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CASE LAW QUARTERLY provides brief summaries of select appellate court decisions issued each quarter of the year that involve the guidelines and other aspects of federal sentencing. The list of cases and the summaries themselves are not intended to be comprehensive. Instead, this document summarizes only a few of the relevant cases, focusing on selected sentencing topics that may be of current interest. The Commission's legal staff publishes this document to assist in understanding and applying the sentencing guidelines. The information in this document does not necessarily represent the official position of the Commission, and it should not be considered definitive or comprehensive.

SUMMARY OF SELECT APPELLATE CASES FOR THE THIRD QUARTER OF 2017—

FIRST CIRCUIT

United States v. O'Brien, No. 15-1961 (1st Cir. Aug. 31, 2017). The First Circuit affirmed the defendant's 45-month sentence for wire, securities, mail and investment advisor fraud, holding that it was not impermissible double counting for the court to impose both the investment advisor enhancement at §2B1.1(b)(19)(A)(iii) and the vulnerable victim increase at §3A1.1(b)(1). The court reasoned that the two provisions focus on different culpability factors and the guidelines have no bar to imposing both increases.

United States v. Ball, No. 16-1526 (1st Cir. Aug. 30, 2017). The First Circuit affirmed the defendant's 96-month sentence for unlawful possession of a firearm, holding that his prior Pennsylvania state conviction for second degree robbery qualified as a crime of violence under the career offender guideline. Looking to the "residual clause" in §4B1.2(a)(2) as it appeared in the 2015 *Guidelines Manual*, the court held that Pennsylvania's definition of second degree robbery necessarily "involves conduct that presents a serious potential risk of physical injury to another," and the statute substantially corresponds to the generic offense of robbery set out in the application notes.

United States v. Cueto-Nunez, 869 F.3d 31 (1st Cir. Aug. 25, 2017). The First Circuit affirmed the defendant's 57-month sentence for illegal reentry, concluding that his within-guidelines sentence was procedurally and substantively reasonable. In addition, the court held that the district court had the discretion to deny a fast-track reduction, even though the government recommended the reduction in the plea agreement and at the sentencing hearing. The court stated that the phrase "may depart downward" in the §5K3.1 fast-track provision vests sole discretion in the district court to decide whether to depart, notwithstanding the parties' agreement otherwise.

United States v. Giggey, 867 F.3d 236 (1st Cir. Aug. 14, 2017). The First Circuit affirmed the defendant's 72-month sentence for conspiracy to distribute and possession with intent to distribute controlled and analogue

substances, specifically, alpha-PVP synthetic cathinones ("bath salts"), a controlled substance not listed in the sentencing guidelines' drug tables. The court held that the district court did not clearly err in finding that methcathinone, and not pyrovalerone, was the most closely-related controlled substance to alpha-PVP for determining drug quantity under the guidelines. It concluded that the district court based its decision on a careful examination of chemical structure, pharmacological effect, and potency of each substance.

United States v. Wurie, 867 F.3d 28 (1st Cir. Aug. 8, 2017). The First Circuit affirmed the defendant's 168-month career offender sentence for distribution of cocaine base, upholding the district court's determination that his prior convictions constituted crimes of violence. The First Circuit rejected the defendant's argument that *Beckles v. United States*, 136 S. Ct. 2510 (2016), required the district court to conduct a new analysis consistent with *Johnson v. United States*, 135 S. Ct. 2551 (2015). It held that *Beckles'* holding that the guideline's residual clause did not present a constitutional problem meant that its residual clause jurisprudence remained the law of the circuit and would not be revisited. The court also rejected the defendant's alternative argument for remand based on Amendment 798, holding that sentencing courts are not mandated to consider non-retroactive substantive amendments to the guidelines that post-date a defendant's sentencing.

United States v. Ellison, 866 F.3d 32 (1st Cir. Aug. 2, 2017). The First Circuit affirmed the defendant's 10-year sentence for federal bank robbery, holding that the offense of conviction, violating 18 U.S.C. § 2113(a) by "force and violence, or intimidation," qualified as a crime of violence under the "force clause" of the career offender guideline. The court explained that taking by intimidation under the statute necessarily involves a threat of bodily harm, and the defendant knew that his actions were objectively intimidating.

SECOND CIRCUIT

United States v. Genao, 869 F.3d 136 (2d Cir. Aug. 28, 2017). The Second Circuit vacated and remanded the defendant's 46-month sentence for illegal reentry, holding that the district court committed procedural error in applying a 16-level enhancement for a prior crime of violence under §2L1.2(b)(1)(A)(ii). The court held that the district court failed to adequately explain its reasons for the sentence and, even if it had adopted the presentence report, that report misidentified one of his prior convictions. It also stated that the district court did not properly evaluate whether either of the defendant's prior robbery or burglary convictions qualified as a crime of violence for purposes of the enhancement.

THIRD CIRCUIT

United States v. Poulson, No. 16-1224 (3d Cir. Sept. 14, 2017). The Third Circuit affirmed the defendant's 70-month sentence for mail fraud related to a Ponzi scheme, upholding an enhancement for substantial financial hardship to more than 25 investors. Addressing the application of §2B1.1(b)(2)(C) for the first time, the court stated that "substantial financial hardship" is measured on a "sliding scale," subject to the sentencing court's discretion. It explained that the determination of whether a loss resulted in a substantial hardship usually is gauged relative to each victim, and it does not require the court to identify finite dollar amounts.

United States v. Martin, 867 F.3d 428 (3d Cir. Aug. 15, 2017). The Third Circuit affirmed the defendant's 87-month sentence for possession with intent to distribute crack cocaine, upholding the district court's denial of his motion for a sentence reduction. At the original sentencing, the district court found that the defendant was a career offender with a guideline range of 188-235, and then imposed a below-guidelines sentence based on the parties' plea agreement. The defendant later moved for a sentence reduction under 18 U.S.C. § 3582(c)(2) based on Amendment 782, which retroactively lowered certain drug sentences. The Third Circuit held that the defendant was not entitled to a reduction because the applicable guideline range was his career offender range, which had not been lowered by any guideline amendment.

United States v. Chapman, 866 F.3d 129 (3d Cir. Aug. 4, 2017). The Third Circuit affirmed the defendant's 70-month sentence under the career offender guideline for mailing a threatening communication, holding that mailing a threatening communication under 18 U.S.C. § 876(c) is a crime of violence under §4B1.2(a)(1). Citing the definition of "use of physical force" found in *United States v. Castleman*, 134 S. Ct. 1405 (2014), and using the modified categorical approach discussed in *Shepard v. United States*, 544 U.S. 13 (2005), the court held that a conviction under § 876(c) qualifies as a predicate crime of violence because knowingly mailing a communication

threatening to injure a person necessarily threatens the use of physical force.

FOURTH CIRCUIT

United States v. Diaz, 865 F. 3d 168 (4th Cir. July 26, 2017), as amended (July 31, 2017). The Fourth Circuit vacated and remanded the district court's order of restitution under the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, in the amount of \$22,151.77, entered as part of the defendant's 9-month sentence for interference with flight crew members in violation of 49 U.S.C. § 46504. The court held that the MVRA did not apply, explaining that the district court failed to determine whether the statute of conviction was a crime of violence, which is required under the MVRA. Holding that interference with flight crew members is not a crime of violence, the court concluded that restitution should be determined using the Victim and Witness Protection Act, 18 U.S.C. § 3663, under which restitution is discretionary.

United States v. Burns-Johnson, 864 F.3d 313 (4th Cir. July 18, 2017). The Fourth Circuit affirmed the defendant's 15-year mandatory minimum sentence for being a felon in possession of a firearm, holding that his prior convictions for armed robbery under North Carolina General Statutes § 14-87 qualified as predicate violent felonies under the Armed Career Criminal Act. Citing the expansive definition of "use of physical force" found in *United States v. Castleman*, 134 S. Ct. 1405 (2014), the court held that a conviction under § 14-87 categorically qualifies as a predicate "violent felony" because the North Carolina statute necessarily entails the use, attempted use, or threatened use of violent physical force.

FIFTH CIRCUIT

United States v. Bello-Sanchez, No. 16-41181 (5th Cir. Sept. 25, 2017). The Fifth Circuit affirmed the defendant's 60-month sentence for possession with intent to distribute methamphetamine, concluding that the district court did not err by declining to apply a mitigating role adjustment under §3B1.2. Although the defendant was a courier rather than the "criminal mastermind," the court concluded that he was not entitled to a mitigating role reduction on that basis. The court stated that sentencing courts may not treat a defendant's integral role as a per se bar to a mitigating role adjustment but they may consider it as an important factor in a broader calculus when applying §3B1.2.

United States v. Kiekow, No. 14-40700 (5th Cir. Sept. 18, 2017). The Fifth Circuit vacated and remanded a defendant's 121-month sentence for conspiracy to distribute or possess with intent to distribute cocaine, holding that the district court plainly erred by applying a 2-level enhancement for maintaining a premises for the purpose of manufacturing or distributing a controlled substance under

§2D1.1(b)(12). The court explained that the district court's application of the enhancement violated the *ex post facto* clause because that enhancement did not yet exist during the period of the conspiracy. Noting that the government conceded there was plain error, the court concluded that the error exposed the defendant to a higher sentence and seriously affected the fairness of the proceedings.

United States v. Perlaza-Ortiz, 869 F.3d 375 (5th Cir. Aug. 23, 2017). The Fifth Circuit vacated and remanded the defendant's 41-month sentence for illegal reentry, holding that the defendant's prior Texas state conviction for deadly conduct did not constitute a crime of violence for purposes of the §2L1.2(b)(1)(A)(ii) enhancement. The court explained that the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016) altered the methodology for analyzing the divisibility of a statute, and thereby rendered defendant's prior Texas conviction insufficient to support a crime of violence enhancement. Stating that the district court's improper calculation influenced the defendant's sentence, the court concluded that the error required remand.

United States v. Nesmith, 866 F.3d 677 (5th Cir. Aug. 8, 2017). The Fifth Circuit vacated and remanded the defendant's 360-month sentence for sexual exploitation of a minor. The court held that the district court's application of a 4-level enhancement under §2G1.2(b)(4) for material portraying sadistic conduct was unwarranted because the victim was unconscious and unaware of the sexual exploitation until learning of the image's content. It explained that an image portrays sadistic conduct where it depicts conduct that an objective observer would perceive as causing the victim pain "contemporaneously with the image's creation."

United States v. Juarez, 866 F.3d 622 (5th Cir. Aug. 7, 2017). The Fifth Circuit vacated and remanded the defendant's 365-month sentence for conspiracy to distribute drugs and possession of firearms in furtherance thereof, holding that the district court erred in applying the body-armor adjustment at §3B1.5 for the defendant's sale of body armor to two co-conspirators. Noting that the Fifth Circuit has only applied the body-armor adjustment where the defendant committed a crime while wearing body armor, the court explained that the defendant's sale of body armor did not constitute "use" or "bartering" under §3B1.5.

SIXTH CIRCUIT

United States v. Verwiebe, No. 16-2591 (6th Cir. Sep. 27, 2017). The Sixth Circuit affirmed the defendant's career offender sentence for assaulting a federal officer with a dangerous weapon, holding that his prior federal assault convictions qualified as predicate crimes of violence under §4B1.2(a). The court concluded that the defendant's two

prior offenses, assault with a dangerous weapon with intent to do bodily harm, in violation of 18 U.S.C. § 113(a)(3), and assault resulting in serious bodily injury, in violation of 18 U.S.C. § 113(a)(6), both require physical force.

United States v. Cook, No. 16-6441 (6th Cir. Sept. 1, 2017). The Sixth Circuit affirmed the defendant's 211-month sentence for conspiracy to distribute crack cocaine, agreeing with the district court's order denying his motion for a sentence reduction under 18 U.S.C. § 3582(c)(2). At the original sentencing, the district court determined that the defendant was a career offender with a guideline range of 262-327 months and, because he had a prior conviction for a felony controlled substance offense, 18 U.S.C. § 841(b)(1)(A) required imposition of a minimum term of life in prison. The district court granted the government's motion for a substantial assistance departure and imposed a sentence of 211 months. The defendant later moved for a reduction based on Amendments 780, 782 and 788, arguing that the original guideline range was life. The Third Circuit held that the district court made it clear at sentencing that the sentence imposed was based on the career offender range, which had not been lowered by any guideline amendment.

United States v. Yates, 866 F.3d 723 (6th Cir. Aug. 9, 2017). The Sixth Circuit vacated and remanded the defendant's 240-month sentence for possession of a firearm by a felon and possession with intent to distribute crack cocaine, holding that he was improperly sentenced as a career offender. The district court's career offender determination was based, in part, on the defendant's prior Ohio state conviction for robbery, in violation of Ohio Rev. Code Ann. § 2911.02(A)(3). The Sixth Circuit held that the Ohio robbery statute does not qualify as a crime of violence under either §4B1.2(a)(1), which requires a higher level of physical force, or under the enumerated offenses clause at §4B1.2(a)(2).

SEVENTH CIRCUIT

United States v. Wagner, No. 15-3265 (7th Cir. Sept. 25, 2017). Affirming the defendant's 132-month sentence for knowingly attempting to persuade or induce a minor to engage in illegal sexual activity, the Seventh Circuit vacated and remanded two special conditions of supervised release. The court held that the district court impermissibly delegated its Article III authority by delegating to a treatment provider the decision of whether the defendant should be banned from accessing adult pornography. It also vacated and remanded as vague the special condition prohibiting his use of the internet to view child pornography or sexually explicit material "unless the sex offender treatment provider directs otherwise." The court stated that this special condition could be read to give the treatment provider authority to permit the defendant to view child pornography, an obviously unintended result.

United States v. Moreno, No. 15-3312 (7th Cir. Aug. 30, 2017). The Seventh Circuit affirmed the defendant's 80-month sentence for trafficking in alpha-PVP, a controlled substance not listed in the sentencing guidelines' drug tables. The Seventh Circuit held that the district court did not err in its choice of methcathinone as the most closely related controlled substance for purposes of calculating drug quantity. Although the court did not find any factual error, it agreed with the defendant that a Schedule V controlled substance that is not specifically named in one of the guidelines' drug tables can be considered a "most closely related controlled substance" for purposes of §2D1.1, Application Note 6.

United States v. Anderson, 866 F.3d 761 (7th Cir. Aug. 7, 2017). The Seventh Circuit reversed a portion of the district court's restitution order, which was entered as part of the defendant's sentence for armed bank robbery. The court held that the district court erred by including in restitution \$2,107, the amount of recovered cash that was stained and burned by a dye pack. The court explained that the government did not bear its burden of showing that the recovered money was so damaged as to be unusable and inadequate for return to the victim bank.

United States v. Harden, 866 F.3d 768 (7th Cir. Aug. 7, 2017). The Seventh Circuit affirmed the denial of safety valve relief from the defendant's 10-year mandatory minimum sentence for possession with intent to distribute cocaine. The court held that the defendant's high-speed flight in a vehicle through a residential neighborhood, which resulted in a collision, involved the "use of violence or credible threats of violence," making him ineligible for a safety valve deviation under 18 U.S.C. § 3553(f)(2).

United States v. Campbell, 865 F.3d 853 (7th Cir. July 31, 2017). The Seventh Circuit affirmed the defendant's 100-month sentence, holding that bank robbery by intimidation under 18 U.S.C. § 2113(a) is a crime of violence for purposes of the pre-2016 career offender provision. Relying on its prior cases involving the elements clause of the federal bank robbery statute, 18 U.S.C. § 924(c)(3), the court concluded that § 2113(a) bank robbery by intimidation is a crime of violence under §4B1.2(a)(1), despite being a general intent crime.

United States v. Sandidge, 863 F.3d 755 (7th Cir. July 17, 2017). The Seventh Circuit modified a condition of the defendant's supervised release, otherwise affirming the defendant's sentence for being a felon in possession of a firearm. The district court had imposed a supervised release condition forbidding excessive use of alcohol, which was defined to include any use "adversely affect[ing]" the defendant's employment, relationships, or ability to comply with the conditions of supervision. The Seventh Circuit held that the "adversely affect" language was unconstitutionally vague but stated that adding the modifier "materially" immediately before "adversely affect" corrects the vagueness problem.

United States v. Bennett, 863 F.3d 679 (7th Cir. July 12, 2017). The Seventh Circuit reversed, vacated and remanded the defendant's 180-month sentence for being a felon in possession of a firearm, holding that his prior Indiana offense of resisting law enforcement was not a crime of violence under the Armed Career Criminal Act. The court stated that the defendant's Indiana conviction for "inflicting bodily injury on, or otherwise causing bodily injury to, another person" while resisting arrest did not necessarily require violence because non-violent conduct could accidentally injure an arresting officer.

United States v. Perry, 862 F.3d 620 (7th Cir. July 6, 2017). The Seventh Circuit affirmed the defendant's 360-month sentence for possession of a firearm and ammunition by a felon, holding that the defendant's two prior Indiana burglary convictions qualified as predicate offenses under the Armed Career Criminal Act (ACCA). The defendant contended that an Indiana burglary conviction is not a "violent felony" for ACCA purposes because it can be committed by breaking into a fenced-in field, which is akin to a burglary on curtilage. Rejecting this argument, the court differentiated curtilage, which need not be fully fenced in, and noted that it found no Indiana burglary convictions that were inconsistent with the generic offense of burglary.

EIGHTH CIRCUIT

United States v. Pierre, No. 16-2797 (8th Cir. Sept. 1, 2017). The Eighth Circuit affirmed the defendant's 210-month sentence for conspiracy to defraud the government and money laundering. The defendant contended, inter alia, that the district court created unwarranted disparities when it sentenced him based on the intended loss and his coconspirators based on the actual loss, under §2B1.1, comment. (n.3(A)). The court stated that the statutory requirement to avoid unwarranted disparities among defendants refers to national disparities, not differences among coconspirators. It also held that any disparity here was warranted by the defendant's greater culpability in the conspiracy.

United States v. Meadows, 866 F.3d 913 (8th Cir. Aug. 8, 2017). The Eighth Circuit affirmed the defendant's 300-month sentence for offenses related to a Ponzi scheme involving the sale of fake bonds. Upholding several guideline adjustments, the court held that the district court properly applied the enhancement for violating securities law under §2B1.1(b)(19)(A). The court relied on the broad text of the Securities Exchange Act, concluding that the sale of fraudulent bonds constitutes a violation of securities law.

United States v. Weaver, 866 F.3d 882 (8th Cir. Aug. 7, 2017). The Eighth Circuit affirmed the defendant's 96-month sentence for conspiracy to commit bank fraud, upholding the 2-level increase under §2B1.1(b)(11)(C)(i) for an offense involving "use of any means of identification"

to produce or obtain another means of identification. The court explained that the increase was warranted because the offense involved affirmative identity theft or breeding, and the victims included individual signatories whose means of identification (their names) were used to produce another means of identification (counterfeit checks). The court also upheld the upward variance, noting that the district court's reasons included the defendant's under-represented criminal history and the need to promote effective deterrence.

United States v. Gauld, 865 F.3d 1030 (8th Cir. Aug. 1, 2017) (en banc). On rehearing en banc, the Eighth Circuit reversed and remanded the defendant's 15-year mandatory minimum sentence for receipt of child pornography, holding that his prior state juvenile adjudication for criminal sexual conduct involving a minor was not a "prior conviction" that would trigger a mandatory minimum sentence under 18 U.S.C. § 2252(b)(1). Looking to federal law and overruling an earlier Eighth Circuit case, the court stated that the Federal Juvenile Delinquency Act has long distinguished between adult criminal convictions and juvenile delinquency adjudications. Because § 2252(b)(1) mentions only convictions, the court concluded that Congress did not intend juvenile adjudications to trigger that statute's mandatory minimum.

United States v. Fields, 863 F.3d 1012 (8th Cir. July 20, 2017). The Eighth Circuit reversed and remanded the defendant's 41-month sentence for being a felon in possession of a firearm, holding that the district court erred in treating the defendant's prior Missouri conviction for second degree assault as a crime of violence, resulting in a higher base offense level under §2K2.1(a)(2). The court explained that the relevant subsection of the Missouri second degree assault statute did not qualify as a crime of violence for §2K2.1(a)(2) purposes because it could be committed by reckless driving that results in injury.

United States v. Fisher, 861 F.3d 802 (8th Cir. July 3, 2017). The Eighth Circuit reversed the defendant's 150-month sentence for bank robbery, holding that the 2-level increase for using a minor to commit the robbery was not warranted. Although the minor waited in the getaway car and mapped out routes for other robberies, the court held that the defendant did not affirmatively act to involve the minor in the offense, as required by §3B1.4, concluding that there was no evidence that he directed, demanded or otherwise encouraged her assistance in the crime of conviction.

NINTH CIRCUIT

United States v. Martinez, No. 17-50026 (9th Cir. Sept. 15, 2017). The Ninth Circuit vacated and remanded the defendant's sentence for illegal reentry, holding that the district court erred in applying the 8-level enhancement under §2L1.2(b)(2)(B). For the defendant's prior conviction of lewd conduct with a child, he had been sentenced to one

year of incarceration before his first deportation order, which was increased to three years of incarceration after he returned to the United States and had his probation revoked. The court held that a qualifying sentence must be imposed before the defendant's first order of removal under §2L1.2(b)(2)(B), reasoning that the 2016 amendment did not change the operation of the guideline with respect to revocations that occurred after the first order of removal.

United States v. D.M., No. 16-50243 (9th Cir. Sept. 7, 2017). In a drug trafficking case, the Ninth Circuit vacated and remanded the district court's order denying the defendant's motion for a reduction of his 57-month below-guidelines sentence, holding that the defendant may be eligible for a reduction based on Amendment 782, which retroactively reduced certain drug sentences. The court stated that the district court could consider other departures in the original sentence, not just substantial assistance, when calculating a sentence reduction under 18 U.S.C. § 3582(c)(2). Agreeing with the reasoning of the Seventh Circuit, it explained that §1B1.10(b)(2)(B) uses the language "term of imprisonment imposed" rather than "the term of imprisonment provided by the guideline range," and that this interpretation rewards cooperators.

United States v. Torres, No. 13-50088 (9th Cir. Sept. 6, 2017). The Ninth Circuit affirmed the defendants' convictions and sentences for racketeering, drug trafficking conspiracy and related offenses, holding that the district court's instruction to the jury on drug quantity was not reversible error. Among other things, the defendants argued that the district court failed to instruct the jury that, to determine relevant conduct, it was required to find that the drug quantities were both "reasonably foreseeable" to each defendant and "in furtherance of jointly undertaken criminal activity." Concluding that even if the instruction were erroneous, it did not affect defendants' substantial rights in this case, the majority noted that en banc consideration would likely be necessary to address the interplay between the standards of 21 U.S.C. § 841(b) culpability and §1B1.3 relevant conduct.

United States v. Ocampo-Estrada, No. 15-50471 (9th Cir. Aug. 29, 2017). The Ninth Circuit vacated and remanded the defendant's 20-year mandatory minimum sentence for conspiracy to distribute methamphetamine, holding that the government did not prove that the defendant's prior state drug trafficking conviction in California was a "felony drug offense" that would trigger a mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A). The court explained that California Health & Safety Code § 11378 is a divisible statute because the controlled substances referenced therein list separate offenses rather than separate means for committing a single offense. The court also relied on *United States v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) (en banc), which held that a similarly-structured statute, California Health & Safety Code

§ 11352, is divisible with respect to its controlled substance requirement.

United States v. Mercado-Moreno, 869 F.3d 942 (9th Cir. Aug. 28, 2017). The Ninth Circuit affirmed the district court's denial of the defendant's motion for a reduction of his 210-month drug trafficking sentence, based on Amendment 782, which retroactively lowered certain drug sentences. The court held that the district court, on the motion for sentence reduction, did not abuse its discretion by making a supplemental finding that the defendant was responsible for at least 4.5 kilograms of methamphetamine and concluding that he was therefore ineligible for a reduction because his guideline range would not change. The Ninth Circuit stated that it was joining the Second, Fourth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits in holding that a district court may supplement the original sentencing court's quantity finding when necessary to determine whether a defendant is eligible for a reduction under 18 U.S.C. § 3582(c). It further elaborated that "[a] district court has broad discretion in how to adjudicate section 3582(c)(2) proceedings, including whether to hold a hearing when making supplemental determinations of drug quantity."

United States v. Robinson, 869 F.3d 933 (9th Cir. Aug. 25, 2017). The Ninth Circuit vacated and remanded the defendant's 90-month sentence for being a felon in possession of firearms, holding that his prior second-degree assault conviction in Washington was not a crime of violence under the Armed Career Criminal Act. The court declined to follow *United States v. Lawrence*, 627 F.3d 1281 (9th Cir. 2010), in which the Ninth Circuit had held that a prior conviction for second-degree assault under Wash. Rev. Code § 9A.36.021 was categorically a predicate crime of violence. Because *Lawrence* preceded *Descamps v. United States*, 133 S. Ct. 2276 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016), the court explained that it had not then considered whether § 9A.36.021 was divisible. Based on the reasoning in *Mathis* and *Descamps*, the court concluded that § 9A.36.021 is indivisible and did not qualify as a crime of violence.

United States v. Brito, 868 F.3d 875 (9th Cir. Aug. 22, 2017). The Ninth Circuit vacated and remanded the district court's order reducing the defendant's sentence for heroin possession to 70 months, holding that the district court had authority to give credit for time served in state custody. At the original sentencing, the district court sentenced the defendant to 80 months' imprisonment, which included a 4-month downward variance for time served in state custody. The defendant later moved for a sentence reduction under 18 U.S.C. § 3582(c)(2) based on Amendment 782, which retroactively lowered certain drug sentences. The Ninth Circuit explained that a defendant's "term of imprisonment" as used in § 3582(c) and § 1B1.10(b)(2)(A) includes time spent in both state and federal custody. The court held that the district court had

the authority when reducing defendant's sentence to again give credit for the time spent in state custody, even though it would bring his new sentence to a "term that is less than the minimum of the guideline range," as required by § 1B1.10(b)(2)(A).

United States v. Martinez-Lopez, 864 F.3d 1034 (9th Cir. July 28, 2017) (en banc). The Ninth Circuit affirmed the defendant's 77-month sentence for illegal reentry, holding that his prior state drug trafficking conviction in California qualified as a predicate "drug trafficking offense" warranting a 16-level enhancement under § 2L1.2(b)(1)(A)(i) (2012). The court explained that, in light of recent Supreme Court cases, it was revisiting the divisibility of California Health and Safety Code § 11352, which criminalizes a range of activities related to controlled substances. Holding that the statute is divisible with respect to both its controlled substance requirement and its *actus reus* requirement, the court concluded that the district court appropriately applied the modified categorical approach.

United States v. Chavez-Cuevas, 862 F.3d 729 (9th Cir. July 10, 2017). The Ninth Circuit affirmed defendant's 57-month sentence for illegal reentry, holding that the district court did not err in applying a 16-level enhancement under § 2L1.2(b)(1)(A)(ii) based on the defendant's prior robbery conviction under Calif. Penal Code § 211. The court held that *United States v. Becerril-Lopez*, 541 F.3d 881 (9th Cir. 2008), which held that Calif. Penal Code § 211 was categorically a crime of violence under § 2L1.2(b), remains good law following *Descamps v. United States*, 133 S. Ct. 2276 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016).

TENTH CIRCUIT

United States v. Haymond, No. 16-5156 (10th Cir. Aug. 31, 2017). The Tenth Circuit vacated and remanded the defendant's 60-month sentence for violating his supervised release by possessing child pornography. The court held that the provision in 18 U.S.C. § 3583(k) mandating a 60-month sentence for revocation of a registered sex offender's supervised release violates the general principles of due process and the right to jury trial. Explaining its holding, the court stated that § 3583(k) increases the mandatory sentencing range based on facts found by a judge by a preponderance of the evidence, and not by a jury beyond a reasonable doubt, and imposes increased punishment based on subsequent conduct rather than the original crime of conviction. The court remanded for resentencing under 18 U.S.C. § 3583(e)(3), without consideration of § 3583(k)'s mandatory minimum sentence provision or its increased penalties for subsequent conduct.

United States v. Archuleta, 865 F.3d 1280 (10th Cir. July 28, 2017). The Tenth Circuit vacated and remanded the defendant's 204-month sentence for armed bank robbery,

brandishing a firearm during a crime of violence and conspiracy. The court held that the district court erred by: (1) assigning a criminal history point for a prior marijuana possession conviction when the defendant was a juvenile; and (2) imposing a sentence for the conspiracy count that exceeded the statutory maximum. In addition, the Tenth Circuit addressed a circuit split regarding what constitutes abduction for the 4-level increase in the robbery guideline at §2B3.1(b)(4)(A), finding that the district court properly applied that enhancement. Adopting the Third Circuit's 3-part test, the court held that the forced movement of victims from one room or area to another within the same building is a sufficient change of location to constitute an "abduction" for purposes of the enhancement.

ELEVENTH CIRCUIT

United States v. Vail-Bailon, 868 F.3d 1293 (11th Cir. Aug. 25, 2017) (en banc). The Eleventh Circuit affirmed the defendant's 37-month sentence for illegal reentry, holding that his prior state conviction for felony battery in Florida qualified as a crime of violence under §2L1.2. The court held that the defendant's prior felony battery offense, Fla. Stat. § 784.041, was a crime of violence under the then-applicable version of §2L1.2 because it categorically involved the use of physical force against another, as required by the definition in the guidelines commentary. It explained that the offense, which Florida courts had defined to require "force capable of causing injury or pain," required the type of "violent force" that the Supreme Court held qualified for this type of enhancement in *Johnson v. United States*, 559 U.S. 133 (2010).

United States v. Mathurin, 868 F.3d 921 (11th Cir. Aug. 18, 2017). The Eleventh Circuit affirmed the juvenile defendant's 685-month sentence for multiple armed robbery and carjacking offenses, holding that the defendant's sentence did not violate the Eighth Amendment as interpreted by the Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010), which prohibits life without parole for non-homicide juvenile offenders. Factoring in the defendant's time served and reasoning that he can earn good-time credits, the court held that the sentence imposed allows the defendant a meaningful opportunity for release during his lifetime. In addition, the Eleventh Circuit concluded that the imposition of a longer sentence after retrial by a different district judge was not an impermissible exercise of judicial vindictiveness.

United States v. Gill, 864 F.3d 1279 (11th Cir. July 27, 2017). The Eleventh Circuit affirmed the defendant's 80-month sentence for possession of a firearm by a felon and held that the sentencing court properly applied a 4-level increase for the defendant's possession of eight firearms under §2K2.1(b)(1)(B), even though his possession of one of the firearms was illegal only under state law, not federal law. The court agreed with the Seventh Circuit that

a firearm may be counted under §2K2.1(b)(1) if state law prohibited the defendant from possessing it, even if federal law did not, and stated that a "firearm that is illegal only under state law does not count for § 922(g) purposes, but it does count for sentencing purposes."

United States v. Burke, 863 F.3d 1355 (11th Cir. July 19, 2017). The Eleventh Circuit affirmed a 57-month sentence for being a felon in possession of a firearm, holding that it was appropriate for the district court to consider, in calculating the defendant's criminal history score, a state sentence imposed after the defendant's original federal sentencing but before his resentencing. The defendant had originally been convicted under the Armed Career Criminal Act, but his sentence was vacated in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). After his original federal sentencing in 2010, the defendant was convicted of violent state offenses in 2011, which he argued were not "prior sentence[s]" as that term is defined in §4A1.2(a). The Eleventh Circuit acknowledged a circuit conflict on this question and agreed with the Eighth and Ninth Circuits, holding that because, under circuit precedent, a vacated sentence becomes "void in its entirety," any sentence imposed before resentencing is a "prior sentence."

United States v. Lange, 862 F.3d 1290 (11th Cir. July 17, 2017). The Eleventh Circuit affirmed a 130-month sentence for drug trafficking and firearms, holding that a prior Florida conviction for being a principal to attempted manufacture of methamphetamine was a "controlled substance offense" under the career offender guideline. The court explained that the defendant's conduct fell under the definition in §4B1.2(a)(2), which encompasses any offense that "prohibits the manufacture" of a controlled substance. The court also rejected the defendant's argument that the government had engaged in "sentencing factor manipulation" by encouraging additional criminal transactions prior to arrest, finding there was no circuit precedent for reducing a sentence on that basis and, even if there were, the defendant had not shown extraordinary misconduct.

United States v. Wright, 862 F.3d 1265 (11th Cir. July 14, 2017). The Eleventh Circuit affirmed in part, reversed in part and remanded the defendant's 84-month sentence for identify theft and conspiracy to commit wire fraud. The court held that a traffic citation for driving on a suspended license did not constitute an "arrest" for purposes of the "single sentence rule" at §4A1.2(a)(2). As a result, the court held that two other offenses were not "separated by an intervening arrest," and therefore counted only as a single criminal history event, reducing the number of criminal history points attributable to the defendant. The court also directed the district court to make sufficient factual findings on remand about whether another of the defendant's charges resulted in an adjudication of guilt, and whether the government had adequately demonstrated that the defendant had possessed a sufficient

quantity of “access devices” to justify the loss amount it calculated under Application Note 3(F)(i) to §2B1.1. It affirmed the conclusion that the debit cards and Social Security numbers possessed by the defendant were access devices, but remanded for reconsideration of whether other “personal identifying information” possessed by the defendant qualified under the definition. The court also affirmed the district court’s denial of minor role and acceptance of responsibility reductions.

United States v. Melton, 861 F.3d 1320 (11th Cir. July 10, 2017). In a cocaine trafficking case, the Eleventh Circuit reversed and vacated the district court’s grant of sentence reductions based on retroactive application of Amendment 782, which lowered the applicable guidelines range. The defendants had originally been sentenced to statutory minimum sentences of 120 months, after the court granted the government’s motion for §5K1.1 substantial assistance departures. Based on Amendment 782, the district court reduced their sentences to 86 and 101 months. The Eleventh Circuit held that the defendants were not entitled to the reduction because the original sentence was based on the statutory mandatory minimum rather than the guidelines range. It also stated that the government’s promise in the plea agreement to move for a downward departure based on substantial assistance at sentencing did not require it to move for a sentence below the statutory minimum sentence upon the defendants’ later motion for a sentence reduction.

D.C. CIRCUIT

United States v. Slatten, 865 F.3d 767 (D.C. Cir. Aug. 4, 2017). In a case involving manslaughter offenses by defense contractors who provided security services for the United States in Iraq, the D.C. Circuit vacated and remanded, in part, the 30-year mandatory minimum sentences imposed for discharge of firearms in relation to a crime of violence. The court held that imposition of the 30-year mandatory minimum under 18 U.S.C. § 924(c), as

applied to these very unusual circumstances, violated the Eighth Amendment’s prohibition against cruel and unusual punishment. The court found the sentences cruel because they were imposed on private security contractors in a war zone who were armed with government-issued automatic rifles and explosives. It found them unusual because they applied § 924(c) “in a manner it has never been applied before to a situation which Congress never contemplated.”

United States v. Rock, 863 F.3d (D.C. Cir. July 18, 2017). The D.C. Circuit affirmed the length of the defendant’s 172-month sentence for distribution of child pornography, stating that a comment by the district court regarding recidivism rates had no influence on the sentence imposed. It also vacated two special conditions of the defendant’s supervised release: (1) that the defendant notify the probation office whenever he established a “significant romantic relationship” and inform the other party of his prior sex offense history; and (2) that he submit to penile plethysmograph testing.

United States v. Pyles, 862 F.3d 82 (D.C. Cir. July 7, 2017). Affirming the defendant’s within-guidelines sentence of 132 months for possession of child pornography and traveling with intent to engage in illicit sexual acts, the D.C. Circuit held that the district court did not commit plain procedural error by not explicitly addressing each and every non-frivolous mitigation argument on the record when pronouncing the sentence. On appeal, the defendant contended that the district court failed to consider his two arguments for a variance, specifically, that: (1) his childhood abuse led to his criminal conduct, and (2) the child pornography guidelines do not adequately consider each defendant’s individual characteristics. The D.C. Circuit held that, although a district court must consider the defendant’s non-frivolous mitigation arguments before imposing a sentence, it is not required to individually and expressly address each argument on the record if it gives a reasoned basis for the sentence.



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